

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

84

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

C. S. McClelland
4325 49th Street, N.W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant brings this appeal, in forma pauperis,
following his conviction and sentence in the United States District
Court for the District of Columbia, Criminal No. 826-69.

(This case has not previously been before the court, except for
motion for bail in No. 23208)

This Court has jurisdiction under Title 28, Section 1291, United States Code.

REFERENCES

While the original of the Juvenile Court Waiver Order is in the Original Record prepared by the Criminal Clerk's Office, U. S. District Court, it was not numbered. The numbered copy, to which the brief refers, is a part of the item numbered "36", and appears in Juvenile Court file No. 69-0369-J. The Waiver Order Supporting Statement is in the same file and references thereto in the brief as W.O.S.S., followed by a reference to the involved page number or numbers in the statement. The Original Record and the Supplemental Record are referred to as "O. Rec." and "S. Rec.", respectively.

STATEMENT OF ISSUES PRESENTED

Whether the failure of the Juvenile Court properly to collect and disclose certain available relevant evidence, and properly to represent certain other relevant evidence demonstrates that the Court did not make an informed intelligent decision so as to accomplish the required "full investigation" -- and therefore acted arbitrarily and without appropriate due process -- in its waiver of jurisdiction over appellant to the District Court, thereby invalidating the latter Court's exercise of jurisdiction over the appellant as well as invalidating the waiver itself.

STATEMENT OF THE CASE

This is an appeal from the denial of a motion to dismiss the indictment of the appellant after waiver of jurisdiction by the Juvenile Court of the District of Columbia. Appellant now is serving a sentence under section 5010(b) of the Federal Youth Corrections Act, imposed after a guilty plea.

By waiver order, dated April 29, 1969 (O. Rec. 36, part of Juv. Ct. File No. 69-0369-J), the jurisdiction of the Juvenile Court of the District of Columbia over the appellant was waived and it was thereby ordered that the appellant be held for trial under the regular procedure of the United States District Court for the District of Columbia, for certain alleged offenses which would amount to felonies in the case of an adult, as follows:

- (a) Burglary II
 - Date: On or about December 29, 1968
 - Place: In the vicinity of 945 - 9th Street, N.W.
 - Complainant: Cecil Hill
- (b) Attempted escape from a federal institution, Escape from a federal institution, Destruction of D. C. property
 - Date: On or about December 31, 1968
 - Place: D. C. Juvenile Court, 410 E Street, N.W.
 - Complainant: Donald T. Carson

(c) Assault on an employee of a correctional institution of the District of Columbia
Date: On or about February 3, 1969
Place: 1000 Olivet Road, N.E.
Complainant: Curtis J. Beck

(d) And/or any other offenses arising out of the acts or transactions set forth in (a), (b), or (c), which would also amount to felonies in the case of an adult.

The waiver order states that the full investigation referred to therein included waiver proceedings and a hearing in which appellant was represented by counsel; that all Court legal and social records on appellant were made available to counsel; and that a statement in support of the waiver order has been issued. That statement (Part of Juv. Ct. File No. 69-0369-J) appears to include a chronological summary of appellant's record ^{1/} to date. However, the statement does not include any reference to a progress report, dated October 29, 1968, of the Children's Center, Juvenile Facility, Laurel, Maryland (O. Rec. 37), covering the period since September 7, 1968, to November 1, 1968 (W.O.S.S. 4, par. 2, 3), and stating in pertinent part:

COTTAGE: Orlando is making a very good adjustment on the cottage level. He participates in all group activities and staff feels positive toward student.

* * *

1/ Nor do the Juvenile Court legal and social records include a copy. The Criminal Clerk's Office placed a copy in the original record as item 37, after appellant's counsel arranged to have that office request the Juvenile Court to obtain and transmit a copy.

TRAINING: He is presently assigned to paint shop, and doing a very good job. He is also a leader in the shop.

* * *

RECOMMENDATIONS: 1. No change in program.
2. Review in two months.

The statement in support of the waiver order states that:

Since January 21, 1969, when waiver proceedings were initiated, the Court and Respondent's attorney have made a full investigation of all possible rehabilitative alternatives for this particular juvenile. Mr. Ulysses Sherard, a supervisory social worker at the Children's Center, testified at the waiver hearing on April 22, 1969. Mr. Sherard recommended that Respondent be placed in the New Facility at the Children's Center. The recommendation was based on the services available at the New Facility, such as individualized academic program, vocational training, psychological services and a full time psychiatrist. Along with its consideration of this plan for the Respondent, the Court took into account the question of protection of the public. Respondent absconded from the Children's Center in January 1967. He is charged with attempting to escape from the boiler room in the basement of the D. C. Juvenile Court and with escaping from the lock-up of the D. C. Juvenile Court on December 30, 1968. The Court also considered the charge against the Respondent alleging that he assaulted an employee in the Receiving Home for Children.

The Court found that although the rehabilitative services at the New Facility could benefit this Respondent, the history of abscondences and assaultive behavior pose /sic/ a threat to the safety of the community. The absconce rate at the New Facility is high, thus leaving the public with little assurance that its interests will be fully protected.

There was no showing that Respondent was civilly committable and the Court Intake Officer recommended that jurisdiction be waived.

Upon consideration of the entire record, I conclude that by the use of facilities currently available to the Juvenile Court, there are not reasonable prospects for either rehabilitation of the Respondent or adequate protection of the public.

(W.O.S.S. 5, 6)

With respect to the reference in the supporting statement that ". . . the Court Intake Officer recommended that jurisdiction be waived," the record shows--but the Juvenile Court failed to mention--that the Intake Officer recommended against waiver in her written report of January 13, 1969, to the Chief Judge of the Juvenile Court, and that the Chief of Social Services, Mr. Silverman, agreed (Juv. Ct. File No. 105689). The transcript of the waiver hearing shows what appears to be the Court Intake Officer's explanation of her recommendation against waiver, as follows:

My reasons are in that I have had very limited contact with this child, my first contact and only contact with him was made at the Receiving Home after he was placed in there for the offense of burglary on the date of December 30, 1968, I did not feel --- at least I felt that since he had been at Cedar Knoll for an extensive period of time, over a period of maybe five or six years, and that he has been in contact with other workers who knew his assets and limitations better than I, that it should be my position to accept the recommendation of the worker at Cedar Knoll who has had more contact

* * *

To be perfectly honest, my contact with him revealed all negative results. I see this child as being a very aggressive child, a child who is not amenable to the services which the Court has to offer at this time and as a result of my contact with his

mother and with the child, I feel that he should be waived.

(O. Rec. 21, pp. 5, 6)

On cross examination with respect to her concluding statement that appellant "should be waived," the Court Intake Officer recommended that he should not be waived:

Q So is it now your recommendation that the boy should be given an opportunity to function at the New Facility where he has not been treated?

A I feel that he should be exposed to this, yes.

Q So, in fact, you're recommending, Miss Miller, that he should not be waived?

A Right.

(O. Rec. 21, p. 11).

Certain later testimony of the Court Intake Officer appears to explain her answer that appellant should not be waived, as follows:

Q So in other words, if it was a fact that Orlando Willis stayed at the New Facility between the period September 1968 through the period November 1968, it would be your opinion that, in fact, this boy can and will stay at the New Facility?

A Yes.

* * *

(O. Rec. 21, p. 16).

THE COURT: Now explain it.

WITNESS: Yes, I'm saying that I feel that on the basis of what this New Facility

has to offer this child now. This child has never been exposed to extensive treatment by psychiatrists and I think that at this time the Court should consider this point. All right, ever since he was eleven years old, yes, that's been a recommendation by psychologists who have evaluated him that this child was in need of this type of treatment. He was never exposed to this. Now since we have a resource to refer this child to, I feel that he should be exposed to this. We have to see just how he can benefit from this before saying that what the Court has to offer would not be beneficial to the child.

(O. Rec. 21, p. 27).

* * *

A. . . . Now maybe if he's exposed to the services of full-time psychiatrists, maybe within the next two or three months, his behavior, or let's say his self-concepts will change; maybe he will not be considered two or three months from now as being dangerous to the community or detrimental to those who reside with him.

Q In other words, Miss Miller, you're saying maybe, and I think correctly so, it's a fact, Miss Miller, we don't know, in fact, if Orlando Willis can be helped and then again, we do not know if he cannot because we have never tried him in this New Facility?

A Right.

(O. Rec. 21, p. 32)

With respect to the Juvenile Court's reference in its supporting statement, that the appellant's history of abscondences and assaultive behavior poses a threat to the safety of the community, the transcript of the waiver hearing contains certain testimony as follows:

Q Mr. Sherad, do you know whether the New Facility can contain him for a long period of time?

A I do.

Q What's the basis for such a fact?

A The basis is we do have the facilities, the physical structure to hold him and we think once he becomes meaningfully involved in the program, of course, his need to abscond and run away will lessen.

(O. Rec. 21, pp. 43, 44).

* * *

Q Has this boy ever resided at the New Facility?

A He has resided there.

Q What are the dates?

A He came there 1968. He was placed there pending his Initial Hearing and he had his hearing 10-1-68, at which time the Court released him to his mother, so he stayed there from 9-10-68 to 10-1-68.

Q And during that time did you have any problems in that he absconded from the New Facility?

A He did not abscond; simply I can't say he wouldn't simply because he was within our maximum security within our Juvenile Facility.

Q Was he there for the entire time in one maximum facility?

A No, he was, I think he had not gotten out until a few days before his hearing because it was due to over-population.

(O. Rec. 21, pp. 35, 36).

* * *

WITNESS: We have the same date, 11-1-68 he came for Initial Hearing. This is just an error on my part.

MR. NUZZO: In other words, he was there from September . . . ?

WITNESS: That's right to November the 1st.

(O. Rec. 21, p. 50).

The chronological summary in the waiver order supporting statement shows that the appellant was placed on bond on November first (W.O.S.S. 4). But it is just prior to that date in the chronology that there appears an obvious gap in the information collected by the Court, which involves the appellant's very good record at the New Facility as recorded in the progress report of October 29, 1968, recommending that the appellant continue in the same program.

A hearing on a motion for reconsideration of the waiver was held on July 1, 1969 (O. Rec. 25) and the motion was denied on July 3, 1969 (Juv. Ct. File No. 69-1369-J). In the meantime, the appellant was presented to the United States Commissioner on April 30, 1969, who set May 13, 1969, as the date for a preliminary hearing, and remanded the appellant to the District of Columbia Jail. Probable cause was found at the preliminary hearing and therefore the case was referred to the grand jury (O. Rec. unnumbered document - U. S. Commissioner's "Record of Proceedings in Criminal Cases"). The grand jury

indicted the appellant on June 3, 1969, in a three-count indictment, charging George J. Belton and the appellant with assault on supervisor of juvenile with dangerous weapon, robbery, and assault with dangerous weapon (O. Rec. 6). Upon learning that the transcript of the waiver hearing would not be available until about September 1, 1969, appellant's counsel entered an oral motion before the Chief Judge, District Court, on June 17, 1969, that the indictment be dismissed for lack of speedy trial, which was denied (O. Rec. 10). Appellant's motion to amend the conditions of release set by the United States Commissioner was denied by the District Court by order of July 8, 1969 (O. Rec. 5, 14) and the order was affirmed by this Court on August 13, 1969 (O. Rec. 22).

A motion to dismiss the indictment against the appellant was filed September 18, 1969 (O. Rec. 26). Later, a petition for habeas corpus, questioning the validity of the place of confinement, pending the outcome of the indictment against the appellant, was dismissed, and motion to vacate the ruling on the petition and set the petition for a hearing on the rule, was denied (S. Rec. 38, p. 4).

A motion for transfer of the appellant from the District of Columbia Jail to the New Facility, in lieu of release on bond, pending the disposition of charges against him was denied as not timely filed, on December 15, 1969 (O. Rec. 28).

A hearing on the appellant's motion to dismiss the indictment was held on January 5, 1970 and the motion was denied. The basis of the denial was stated as follows:

... the Court finds that the defendant, Orlando Ray Willis, is not properly treatable in a juvenile facility; that the public could not be adequately protected if the juvenile remained within the jurisdiction of the Juvenile Court.

The defendant was accorded a full hearing and had the assistance of counsel at all stages. The procedural rights of the juvenile were protected in every respect, and there was no violation of due process.

The Court further finds that the defendant, Orlando Ray Willis, was not suffering from any mental illness and there is no present indication of mental illness.

Accordingly, the waiver by the Juvenile Court is held to be valid and entirely consistent with the purposes of the Juvenile Court Act.

The motion to dismiss the indictment will be and hereby is denied.

(S. Rec. 38, pp. 24, 25).

On February 19, 1970, the appellant pleaded guilty to the offense of assault on supervisor of juvenile and he was committed to the custody of the Attorney General or his authorized representative pursuant to title 18, United States Code, section 5010(e) for study and report within 60 days (O. Rec. 31). On April 14, 1970, the appellant was committed to the custody of the Attorney General or his authorized representative pursuant to the provisions of the Federal

Youth Corrections Act, title 18, United States Code, section 5010(b), and the remaining counts of the indictment were dismissed (O. Rec. 32). On the same day the appellant filed notice of appeal on the ground that the Juvenile Court waiver was invalid and that therefore the District Court had no jurisdiction. (O. Rec. 33).

SUMMARY OF ARGUMENT

I. The Juvenile Court's waiver of jurisdiction over appellant to the District Court is invalid because the Court failed to conduct the full investigation required and because it otherwise denied the appellant due process of law.

A. The Juvenile Court failed to conduct the full investigation required before waiver of a juvenile to the District Court. It failed to collect sufficient evidence to make an informed intelligent decision as to both rehabilitative possibilities and adequacy of protection of the public. It was not fully advised of the relevant facts.

The Juvenile Court investigation failed to reveal that there is no method of treatment or supervision short of adult treatment.

The Court's action in proceeding to make its conclusions without collecting the available necessary evidence makes such action demonstrable evidence of arbitrariness. The Court's failure to collect the available evidence is initially noticeable, generally, in its failure to assemble and analyze the entire record which included the seventy-seven page transcript of the waiver hearing, containing evidence in conflict with the conclusions involved in the waiver order and its supporting statement. Specifically, the

Court's failure appears very noticeable in the extent to which its omissions in its supporting statement present an erroneous image of the appellant, of the recommendation of a cognizant official with respect to him, of the adequacy of protection of the public, and of the actual sources of responsibility for the offenses charged against the appellant.

B. The record presented by the Juvenile Court as "the entire record" is so unfair to the appellant as to deprive him of due process of law and thereby invalidate the waiver of the appellant to the District Court.

II. Since the Juvenile Court waiver is invalid, the District Court's exercise of jurisdiction over the appellant was invalid and therefore its indictment should have been dismissed.

III. The District Court's decision is in error because it is the result of findings based upon that Court's failure to reconcile the errors, concealments, failures and misrepresentations of the Juvenile Court and upon the insufficient evidence relied upon by the latter court in making its conclusions.

ARGUMENT

I. THE JUVENILE COURT'S WAIVER OF JURISDICTION OVER APPELLANT TO THE DISTRICT COURT IS INVALID BECAUSE THE COURT FAILED TO CONDUCT THE FULL INVESTIGATION REQUIRED AND BECAUSE IT OTHERWISE DENIED THE APPELLANT DUE PROCESS OF LAW.

A. The Juvenile Court failed to conduct the full investigation required before waiver of a juvenile to the District Court.

The Juvenile Court failed to collect sufficient evidence to make an informed, intelligent decision as to both the rehabilitative possibilities of the appellant and the adequacy of protection of the public. ^{3/} It was not fully advised of the relevant facts. The Juvenile Court investigation failed to reveal that there is no method of treatment or supervision short of adult treatment.

2/

11 D. C. Code 1553 (1967) provides in relevant part:

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony,, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; (Under-scoring supplied).

3/

JUVENILE COURT OF THE DISTRICT OF COLUMBIA, May 18, 1966 -- UNIFORM POLICY POSITION OF THE JUDGES -- No. 1: Waiver Standards and Factors Relevant Thereto, refer 1, to the treatability of the public, and 2, to the protection of the public, and state that a judge in making his decision whether or not to waive will be guided by those two standards, either one of which may serve as a sufficient basis for waiver.

The Court's action in proceeding to make its conclusions without collecting the available necessary evidence makes such action demonstrable evidence of arbitrariness. The Court's failure to collect the available evidence is initially noticeable, generally, in its failure first to assemble and analyze the entire record which included the seventy-seven page transcript of the waiver hearing, ^{4/} which is substantially in conflict with the conclusions involved in the waiver order (O. Rec. 36, part of Juv. Ct. file No. 69-0369-J) and its supporting statement (Juv. Ct. file No. 69-0369-J). Specifically, the Court's failure appears very noticeable:

1. in its omission in its supporting statement, of any reference to the appellant's residence at the New Facility from September 10 to November 1, 1968 (O. Rec. 21, pp. 36, 50), and to the very good response appellant made to the treatment there until the Juvenile Court itself inexplicably removed him and put him out on bond (W.O.S.S. 4), notwithstanding the fact that the New Facility recommended that he remain there in the same program, as shown in its Progress Report of October 29, 1968 (O. Rec. 37),

4/

It is to be noted that the Waiver Hearing Transcript covers a hearing on April 22, 1969; that the certificate of the reporter is dated September 2, 1969 (O. Rec. 21, cover and p. 77); and that the Waiver Order is dated April 29, 1969, (O. Rec. 36).

also omitted in the Court's supporting statement and in the legal and social records referred to in its waiver order.

2. in its not disclosing that whereas the Court Intake Officer made a statement near the beginning of the Waiver Hearing that she felt that jurisdiction of the appellant should be waived to the District Court (O. Rec. 21, p. 6), her written recommendation of January 13, 1969, to the Chief Judge of the Juvenile Court, with which the Chief of Social Services agreed, recommended against waiver (Juv. Ct. File No. 105689), and she later in the Waiver Hearing clearly testified that jurisdiction not be waived (O. Rec. 21, p. 11) and specified her reasons (O. Rec. 21, pp. 11, 15, 16, 27, 32), and

... in its not reconciling its conclusion that " . . . there are not reasonable prospects for . . . rehabilitation of the Respondent appellant . . ." (W.O.S.S. 6), with the Court Intake Officer's statement at the Waiver Hearing that since the New Facility had "extensive treatment by psychiatrists" to offer appellant whose need therefor had been known by the Court since he was eleven years of age, "we have to see just how he can benefit from this before saying that what the Court has to offer would not be beneficial to the child." (O. Rec. 21, p. 27).

The third deficiency also is for consideration in relation to the Court's conclusion as to the adequacy of protection of the public (W.O.S.S. 6), since the appellant's interest in remaining out of

the community for the necessary period of time naturally would be in direct proportion to the help he received from the facilities of the Court. However, the first two of the foregoing omissions are especially important when related to the nature of the evidence relied upon by the Court in its conclusion that by the use of facilities currently available, ". . . there are not reasonable prospects for . . . adequate protection of the public . . .".

The evidence relied upon by the Juvenile Court is shown in its statement supporting the Waiver Order as follows:

. . . Respondent Appellant absconded from the Children's Center in January 1967. He is charged with attempting to escape from the boiler room in the basement of the D. C. Juvenile Court and with escaping from the lock-up of the D. C. Juvenile Court on December 30, 1968. The Court also considered the charge against the Respondent alleging that he assaulted an employee in the Receiving Home for Children.

The Court found that although the rehabilitative services at the New Facility could benefit this Respondent, the history of abscondences and assaultive behavior pose a threat to the safety of the community. The absconce rate at the New Facility is high, thus leaving the public with little assurance that its interests will be fully protected. (W.O.S.S., 5, 6).

The Court appears to say that while appellant could benefit from the rehabilitative services available, there is no reasonable assurance he would refrain from continuing (alleged) abscondences, which would be necessary for him to be benefitted. But, as will be shown, that reasoning attributes unwarranted significance to the abscondences involved.

The quoted statement appears insufficient to justify the Court's conclusions for reasons as follows:

1. An earlier portion of the Court's statement in support of its waiver shows that the 1967 absconcence involved a home visit, permitted by the Children's Center, from which the appellant failed to return. He was finally picked up at home 5 weeks later (W.O.S.S. 3). That experience in 1967 is hardly grounds for concluding that it would be repeated in 1969 if appellant were living at the New Facility (which did not exist in 1967), and getting the long overdue psychiatric treatment and work-school training available there. On the contrary, the evidence of the appellant's good response to the treatment at the New Facility, as shown in the Progress Report of October 29, 1968 (O. Rec. 37), which shows no attempt on the part of the defendant to abscond and no basis for concluding that he would abscond, impels the conclusion that if the appellant is given an opportunity to absorb himself in the facilities offered at the New Facility, he has, and would have, no incentive to abscond.

2. The charges of attempting to escape and escape from the Juvenile Court on December 30, 1968, involve alleged incidents on a date when appellant was awaiting a hearing on a charge occurring after the Juvenile Court inexplicably removed the appellant from the New Facility and returned him to the community at a time when he was not ready to return (S. Rec. 38, pp. 11, 12), and should have been left at the New

Facility where he was doing so well, and where the New Facility recommended in its Progress Report of October 29, 1968 (O. Rec. 37) that he be kept. The Juvenile Court's failure to mention that Progress Report, or the period covered thereby, in its supporting statement makes the incidents of December 30, 1968, appear to give unwarranted validity to the Court's conclusion that by the use of facilities currently available to the Juvenile Court, "there are not reasonable prospects for . . . adequate protection of the public" (W.O.S.S. 6). Unwittingly baiting the appellant's poor impulse controls (O. Rec. 21, pp. 27, 40, 70-72) by prematurely exposing him to the temptations of the community was no less damaging to the appellant than an intentional baiting by the Court, and the incidents of December 30 could reasonably be considered a natural, predictable reflex of the Court's inexplicable treatment of the appellant. Clearly, those incidents may not be used, as the Juvenile Court has used them, to justify the conclusion that Court reached with respect to adequate protection of the public, without a clear showing that the Court collected sufficient evidence on the probable causes of the December 30 incidents to make an informed intelligent decision. The absence, in the Court's supporting statement, of any reference to the appellant's whereabouts from September 7 to November 1, 1968, or to the Progress Report of October 29, 1968, on appellant for that period, and the lack of any reconciliation of that report with the Court's action in returning appellant to the community on November 1, is conclusive

evidence that the Court did not collect the necessary evidence and that therefore it did not conduct the full investigation required to justify waiver of jurisdiction to the District Court. In view of its failure to collect the evidence necessary to make an informed, intelligent decision, the Court's use of December 30 incidents is demonstrable evidence of arbitrariness. Also, the Juvenile Court appears arbitrary in suggesting that appellant's alleged reaction to the confinement to which he was subjected on December 30, 1968, following charges made after the Court's premature exposure of the appellant to the community on November 1, 1968, is persuasive evidence of what his reaction would be to continued confinement at the New Facility where he was doing so well until the Court itself removed him contrary to the recommendation of its own arm that he be kept there in the same program.

3. The Court's reference to the charge against the appellant for an alleged assault on an employee in the Receiving Home for Children, in stating what it considered in the matter of protecting the public interest (W.O.S.S. 5, 6), attributes much more significance to that assault than is warranted if the attempted escape sought in the assault is fully considered in the light of the prior treatment of the appellant at the precise time he was making a very good record at the New Facility. The Court failed to show why the assault justified its conclusion that there was, or is, no method short of adult treatment for the appellant. The fact that the New Facility not only existed at the time of the Court's con-

clusion but also had established by appellant's residence there, a method of treatment short of adult treatment for appellant demonstrates that the Court's conclusion was arbitrary and capricious and that the full investigation reported by the Court fell far short of that required by law.

4. Also, the waiver statement fails to show that any information was collected with respect to actions and plans by the New Facility to increase the height of the fence, in other words, the physical set-up itself.

Since April 29, 1969, date of the waiver, the height of the fence surrounding the New Facility was increased and the programs designed to eliminate interest in absconcence have been accelerated. The record indicates that all of this was started shortly after the waiver order was signed, and progressed through a certain portion of the summer (S. rec. 38, p. 12).

The social work supervisor testified at the waiver hearing that the New Facility can contain the appellant for a long period of time, and that:

... we do have the facilities, the physical structure to hold him and we think once he becomes meaningfully involved in the program, of course, his need to abscond and run away will lessen.

(O. Rec. 21, p. 44).

The in-take worker at the waiver hearing answered in the affirmative to the question:

. . . if it was a fact that Orlando Willis stayed at the New Facility between the period September 1968 through the period November 1968, it would be your opinion that, in fact, this boy can and will stay at the New Facility?

(O. Rec. 21, p. 16).

The record shows that the defendant was at the New Facility from September 10, 1968 to November 1, 1968 (O. Rec. 21, pp. 36, 50).

The foregoing is the actual evidence available on the prospects of adequate protection of the public if the appellant were not waived to the District Court. That evidence appears in the transcript of the waiver hearing which was not available until about four months after the waiver order was signed. The order and its supporting statement do not refer to the evidence and give the impression that no such evidence is available. That circumstance underscores the arbitrariness of the Court's waiver order and the lack of due process for the appellant, arising out of the unfairness involved in the Court's procedure.

The evidence relied upon by the Juvenile Court is insufficient to support its conclusion that by the use of facilities currently available to the Court, "there are not reasonable prospects for . . . rehabilitation of the Respondent . . ."

(W.O.S.S. 6).

The Court itself negated the validity of that conclusion by its statement in the second paragraph preceding that conclusion in which it states that ". . . the rehabilitative services at the New Facility could benefit this Respondent . . .".

While the Juvenile Court Judge appears to attempt to reconcile that statement by the introductory phrase of his subsequent statement, "Upon consideration of the entire record, I conclude that . . . there are not reasonable prospects for . . . rehabilitation . . .," the attempt is not persuasive in light of the fact that the Juvenile Court had not assembled "the entire record" at the time it issued the waiver order. As previously stated, it did not have before it the long transcript of the waiver hearing, containing among other testimony, the Court Intake Officer's statement that since the New Facility had "extensive treatment by psychiatrists" to offer appellant whose need therefor had been known by the Court since he was eleven years of age, "We have to see just how he can benefit from this before saying that what the Court has to offer would not be beneficial to the child" (O. Rec. 21, p. 27). Also missing from "the entire record" at the time the waiver order was issued was the New Facility Progress Report of October 29, 1968, clearly showing that the appellant was benefitting from the program at the New Facility. It states that he is making a very good adjustment; he is participating in all group activities; the staff feels positive toward him; he is doing a very good job in his work training; he is a leader in the shop; and he is recommended to stay in the same program. It at least would seem ironic that the Juvenile Court's actions not only make it clear that it had not assembled and given appropriate consideration to that progress report but it acted in such a manner not only in complete conflict with it but also in such manner in

prematurely exposing him to the community, as to lead appellant into the precise difficulties which the Court proceeded to use as its basis for rejecting him, putting him into the D. C. Jail, and ^{5/} ordering him tried as an adult.

The available evidence not collected with respect to the appellant's very good record at the New Facility, the Court Intake Officer's recommendation against waiver, together with her reasons therefor, and the means of the New Facility to contain the appellant, is persuasive to show that a method of treatment and supervision short of adult treatment was available for appellant, and that therefore the Juvenile Court failed to conduct the full investigation required by applicable law. The arbitrary action of the Juvenile Court in proceeding to make conclusions with respect to the rehabilitative possibilities of the appellant and the adequacy of protection of the public, without collecting all of the relevant evidence and analyzing it in relation to the evidence relied upon by the Court was, and is, a bar to the Court in any attempt to relieve itself of responsibility for the welfare of the appellant by resort to the permissive statutory provision as to waiver to the adult court. The statutory command with respect to a full investigation is not observed if the Juvenile Court fails to collect sufficient evidence to be fully advised of the

5/

There appears to be nothing in the record to show that the appellant was any better prepared to return to the community on June 21, 1968 (W.O.S.S. 3) than he was on November 1, 1968 (W.O.S.S. 4), or that the alleged offenses following the earlier return were other than the Court might have expected under the circumstances prevailing at the time the Court exposed him to the temptations of the community.

relevant facts necessary to make an informed intelligent decision.

Kent v. United States, 119 U.S. app. D.C. 378, 387, 343 F. 2d 247, 256 (1964), rev. on other grds., 383 U.S. 541 (1966). The procedure used by the Juvenile Court in reaching its conclusions discloses such evidence of arbitrariness as to require affirmative exercise of the reviewing function of this Court, see Kent v. United States, supra, at 252.

This Court in the case of Haziel v. United States, 131 U. S. App. D.C. 298, 302, 404 F. 2d 1275, 1279 (1968) has stated that:

As the statute provides, and as the Court has time and again emphasized, treatment as a juvenile can be withdrawn only after "full investigation," 11 D. C. Code 1553 (1967); see, e.g., Black v. United States 122 U. S. App. D. C. 393, 355 F. 2d 104 (1965); Watkins v. United States, 119 U. S. App. D. C. 409, 343 F. 2d 278 (1964); Green v. United States, 113 U. S. App. D. C. 348, 308 F. 2d 303 (1964); Pee v. United States, 107 U. S. App. D. C. 47, 274 F. 2d 556 (1959).

Since the presumption of the statutory framework is that juveniles are to be treated as juveniles, the "full investigation" required before waiver to the adult court must explore all the possible dispositions short of waiver by which the "welfare of the child/ and the best interests of the District," 16 D. C. Code 2316(1)(1967), may be secured

That language underscores the responsibility of the Juvenile Court to exercise its discretion "in accordance with the spirit of the Juvenile Court Act", Kent v. United States, 130 U. S. App. D. C. 343, 346, 401 F. 2d 408, 411 (1968), as described by the Supreme Court in the case of Kent v. United States, 383 U. S. 541, 554-555 (1966):

The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The state is parens patriae rather than prosecuting attorney. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness. (Underscoring supplied).

B. The record presented by the Juvenile Court as "the entire record" is so unfair to the appellant as to deprive him of due process of law and thereby invalidate the waiver of the appellant to the District Court.

The Juvenile Court represented that its conclusion to waive jurisdiction over the appellant is based upon a consideration "of the entire record" (W.O.S.S. 6). The fact is that the Court had not assembled the entire record at the time it reached its conclusion to waive. The omissions and misrepresentations of the actual record, as heretofore described in "A", resulted in the presentation of an erroneous image of the appellant, of the recommendation of a cognizant official with respect to the appellant, of the adequacy of protection of the public, and of the actual sources of responsibility for the offenses charged against the appellant. The failure to collect, and the concealment, of the relevant evidence and the misrepresentation of the facts are no

less damaging to the appellant than intentional concealments, failures and misrepresentations, and amount to such unfairness to the appellant as to deprive him of due process of law, Levin v. Katzenbach, 124 U. S. App. D. C. 158, 363 F. 2d 287, 290 (1966), and therefore invalidate the waiver of the appellant to the District Court.

II. SINCE THE JUVENILE COURT WAIVER IS
INVALID, THE DISTRICT COURT'S
EXERCISE OF JURISDICTION OVER THE
APPELLANT WAS INVALID, AND THERE-
FORE ITS INDICTMENT SHOULD HAVE
BEEN DISMISSED.

The proper method of challenging a decision of waiver by the Juvenile Court is by a motion to dismiss the indictment in the District Court. Kent va. Reid, 114 U. S. App. D. C. 330, 316 F. 2d 331 (1963). Such a motion is proper "Since the jurisdiction of the District Court to try the appellant . . . depend(s) on a valid waiver." Haziel v. United States, 131 U. S. App. D. C. 298, 300, 404 F. 2d 1275, 1277 (1968). Since the investigation required to establish a valid waiver was not accomplished, Orlando Ray Willis should not have been waived and, therefore, the subsequent proceedings were invalid and must be vacated and the decision reversed. Kent v. United States, 130 U. S. App. D. C. 343, 347, 401 F. 2d 408, 412 (1968).

III. THE DISTRICT COURT'S DECISION
IS IN ERROR BECAUSE IT IS THE
RESULT OF FINDINGS BASED UPON
THAT COURT'S FAILURE TO RECON-
CILE THE ERRORS, CONCEALMENTS,
FAILURES AND MISREPRESENTATIONS
OF THE JUVENILE COURT AND UPON
THE INSUFFICIENT EVIDENCE RELIED
UPON BY THE LATTER COURT IN
MAKING ITS CONCLUSIONS.

The appellant in substance requested the District Court to declare his waiver invalid because the Juvenile Court failed to conduct the required "full investigation", that is, failed to collect such evidence of the relevant facts as to be able to make an informed, intelligent decision, and because it otherwise denied him due process of law (O. Rec. 26; S. Rec. 38, p.10). The appellant showed that the Juvenile Court misrepresented evidence and failed to collect the evidence of his very good record at the New Facility, of the Court Intake Officer's recommendation against waiver, together with her reasons therefor, and of the means of the New Facility to contain him, all of which established a means of treatment and supervision short of adult treatment. The District Court's reply to that request is its decision upholding the validity of the waiver (S. Rec. 38, pp. 24, 25), which decision in effect is a declaration that the missing and misrepresented evidence, referred to by the appellant does not demonstrate that the Juvenile Court did not make an informed, intelligent decision and that, therefore, the Juvenile Court's failure to collect it and properly represent it does not bar a determination that the

Juvenile Court fulfilled its responsibility to conduct a full investigation and otherwise accord appellant due process of law.

To construe the District Court's decision otherwise, would produce the opposite result because it would inject the denial of due process as well as the "full investigation" prerequisite as a bar to any District Court approval of the waiver.

The District Court's decision, and its findings in support thereof, are as follows:

... the Court finds that the defendant, Orlando Ray Willis, is not properly treatable in a juvenile facility; that the public could not be adequately protected if the juvenile remained within the jurisdiction of the Juvenile Court.

The defendant was accorded a full hearing and had the assistance of counsel at all stages. The procedural rights of the juvenile were protected in every respect, and there was no violation of due process.

Accordingly, the waiver by the Juvenile Court is held to be valid and entirely consistent with the purposes of the Juvenile Court Act.

The motion to dismiss the indictment will be and hereby is denied.

(S. Rec. 38, pp. 24, 25).

Those findings contain no reconciliation, and they clearly are irreconcilable, with the inexplicable procedure of the Juvenile Court in exposing the appellant to the community at a time when its own arm recommended he be kept at the New Facility (O. Rec. 37) where he would not have committed the alleged offenses relied

upon by the Court in its waiver order. The Juvenile Court's premature exposure of the appellant to the community alone refutes the District Court's finding that "The procedural rights of the juvenile were protected in every respect . . .". Since that procedural deficiency was the proximate cause of all the offenses relied upon in the waiver order, it alone provokes grave doubts as to the genuineness of the case for waiver. But there is much more to underscore those doubts and leave no doubt as to the invalidity of the waiver and as to the insupportable nature of the District Court's findings.

The District Court found nothing unfair to the appellant in the Juvenile Court's failure to collect the evidence referred to by him. It found "no violation of "due process". More specifically, it found nothing unfair to the appellant in the Juvenile Court's waiver order supporting statement's concealment of the New Facility's recommendation and of the appellant's good record there , its misrepresentation of the Court Intake Officer's recommendation as to the waiver of the appellant and of the adequacy of protection of the public or in its misrepresentation that there was no available treatment or supervision short of adult treatment.

The Juvenile Court compounded its error of prematurely exposing appellant to the community, and the prejudice suffered by the appellant under that procedure, in that it then proceeded to deprive him permanently of the program in which he was doing

so well at the New Facility, by rejecting him, putting him in the District of Columbia Jail (S. Res. 38, pp. 2, 3, 13), and ordering him tried as an adult for alleged offenses committed precisely during the period following the Court's own order to return him to the community. Then, the Court further compounds its error and the prejudice to the appellant by producing a statement purporting to support its waiver action, which completely omits any reference to the New Facility recommendation and the report on the appellant's very good record there, omits the evidence of the means of the New Facility to contain the appellant and thereby materially contributes to the Court's misrepresentation of the lack of protection of the public, and misrepresents the recommendation of the Court Intake Officer. Such procedure is the very antithesis of that contemplated by both case and statutory law with respect to the appropriate protection and treatment of the juvenile. The District Court's failure to recognize that fact is, we submit, entirely insupportable under ordinary concepts of due process, Levin v. Katzenbach, 124 U. S. App. D. C. 158, 363 F. 2d 287, 290 (1966) supra, and should not be upheld.

Since the District Court's decision that "the waiver by the Juvenile Court is . . . valid and entirely consistent with the purposes of the Juvenile Court Act", is based upon irreconcilable deficiencies of the Juvenile Court procedures in the case and upon the insufficient evidence relied upon by the Juvenile Court in making its conclusions, the decision must be reversed. Kent v. United States, 130 U. S. App. D. C. 343, 345, 401 F. 2d 408, 410 (1968).

CONCLUSION

For the reasons heretofore set forth, it is urged that the District Court's decision as to the validity of the waiver be reversed and that the conviction of the appellant be vacated and set aside.

Respectfully submitted,

C. S. McClelland
4325 49th Street, N. W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was delivered to the Office of the United States Attorney, U. S. Courthouse, Washington, D. C. this _____ day of September, 1970.

C. S. McClelland

RECEIVED
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CLERK OF THE UNITED
STATES COURT OF APPEALS

SUPPLEMENT

TO

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 19 1971

Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLES, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

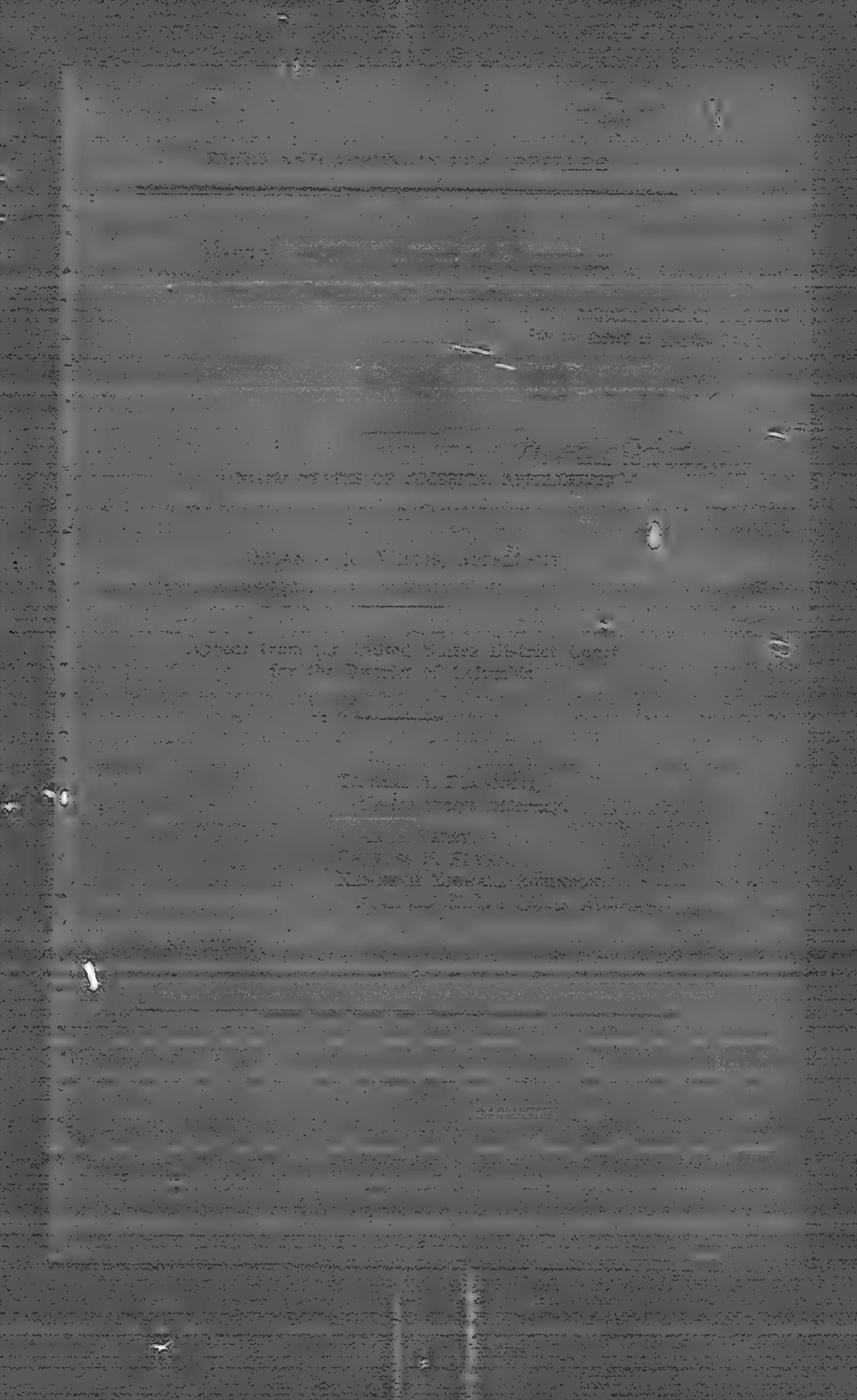
REVIEW ACKNOWLEDGED DATE: 4-5-71

M. J. Flanigan

U. S. Atty. Gen. 1, D. C.

C. S. McClelland
4325 49th Street, N.W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)



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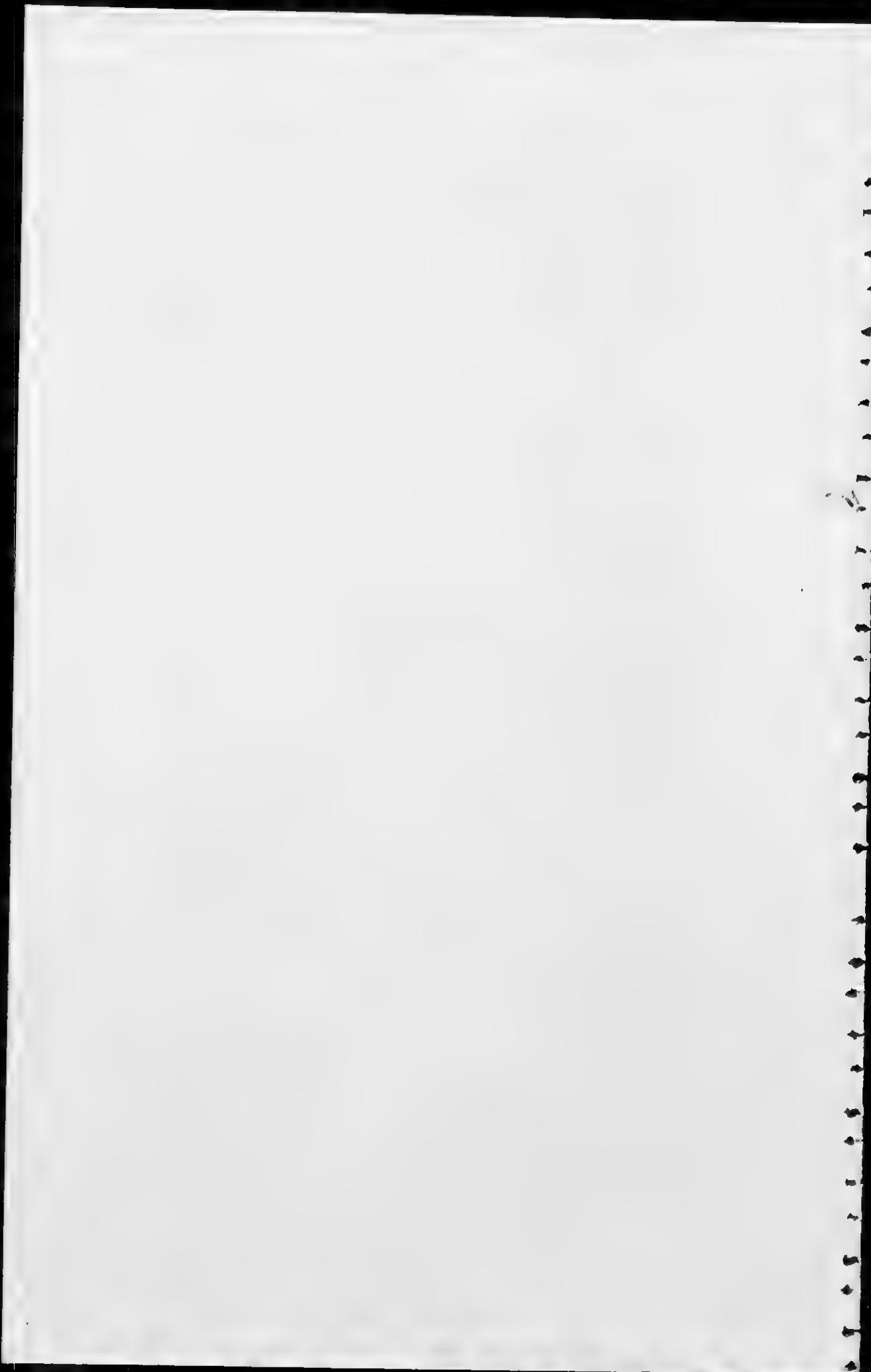
• Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Can this Court re-examine on the merits a discretionary decision by the Juvenile Court in waiving jurisdiction over a juvenile after a full investigation?

* This case has not previously been before this Court.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,262

UNITED STATES OF AMERICA, APPELLEE

v.

ORLANDO R. WILLIS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A hearing was held on April 22, 1969, before the Honorable John D. Fauntleroy of the Juvenile Court of the District of Columbia for the purpose of determining whether appellant should be waived from the Juvenile Court and tried in the United States District Court. On April 29, 1969, Judge Fauntleroy waived appellant to the jurisdiction of the District Court. A three-count indictment was returned on June 3, 1969, in which appellant was charged with assault with a dangerous weapon on a supervisor of juveniles, robbery and assault with a dan-

• (1)
■

gerous weapon.¹ On July 1, 1969, Judge Fauntleroy entertained appellant's motion for reconsideration of the April 29 waiver and denied the motion. On January 5, 1970, in the District Court, the Honorable John Lewis Smith, Jr., held a hearing on appellant's motion to dismiss the indictment. He found that appellant was not properly treatable in a juvenile facility and that appellant was not then suffering from a mental illness, and concluded that the waiver order of Judge Fauntleroy was valid and entirely consistent with the statutory requirements.² Appellant's motion to dismiss the indictment was denied. On January 15, 1970, appellant pleaded guilty to the assault on a supervisor of juveniles as charged in count one of the indictment. On April 14, 1970, appellant was sentenced under the Youth Corrections Act,³ and the remaining counts of the indictment were dismissed by the Government. This appeal followed.

Waiver Proceedings

On April 22, 1969, the Juvenile Court conducted a hearing for purposes of determining whether appellant was treatable at the juvenile facilities of the District of Columbia and, if so, whether the public was adequately protected by his detention as a juvenile.

Miss Constance Miller, appellant's probation officer, recommended non-waiver of appellant but then added that it was apparent that no treatment had helped him. Miss Miller stated that all of her contact with appellant brought about negative results. She labeled appellant as

¹ In violation of 22 D.C. Code § 505 (b), § 2901 and § 502, respectively.

² 11 D.C. Code § 1553 provides in pertinent part:

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony . . . , a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over

³ 18 U.S.C. § 5010 (b).

an aggressive child, not amenable to the services the court had to offer. Miss Miller then responded that appellant should be waived on the basis of her dealings with him. On cross-examination she stated that her evaluation did not consider or include the treatability of appellant at the new Children's Center at Laurel, Maryland, and that in light of the available psychiatrist, job training and prison atmosphere of the new facility, she would recommend that appellant be given a chance there and not be waived (W.H. 3-11).⁴

On redirect examination Miss Miller admitted that appellant had a long history of absconding from the juvenile centers, was being considered for waiver at the time because of his assault on a juvenile supervisor during an escape attempt, and that the security measures at the new facility were not adequate to confine appellant. Miss Miller added that perhaps appellant was treatable, but one never knew whether he would be available for treatment or whether he had escaped again (W.H. 2-15).

On re-cross examination Miss Miller acknowledged that appellant had been confined in the maximum security section of the new facility from September until November of 1968. She admitted that appellant was a danger to the community and his inmates and that he was then residing at the District of Columbia Jail only because of the threat he posed. Miss Miller thought that appellant should be given one more chance at the new facility (W.H. 15-24).

Mr. Ulysses L. Sherad, a supervisor of social work at the Children's Center, also recommended that appellant be given another chance there. Mr. Sherad considered the new facility at the Children's Center to be capable of preventing appellant's escape (W.H. 33-48).

Mrs. Marie Laney, appellant's mother, advised the court that appellant had been in and out of trouble since he was ten or eleven years old (W.H. 51-58).

⁴ "W.H." refers to the transcript of the waiver hearing held on April 22, 1969.

The Assistant Corporation Counsel and defense counsel argued whether appellant should be waived to the District Court and one week later, on April 29, 1969, the court ordered appellant's waiver.

District Court Proceedings

On January 5, 1970, the District Court heard argument on appellant's motion to dismiss the indictment on the ground of improper waiver of juvenile jurisdiction (Tr. 2-24)⁵ and ruled that appellant was not properly treatable in the juvenile facility and that the public could not be adequately protected unless the waiver was upheld (Tr. 24-25).

On January 15, 1970, appellant again came before the District Court and entered his plea of guilty.⁶

ARGUMENT

Appellant may not challenge the Juvenile Court's waiver of jurisdiction since it was ordered after a complete and full investigation and involved a knowledgeable exercise of discretion and expertise.

(W.H. 3-29, 36-48; Tr. 1-25)

This Court has taught us that the Juvenile Court is a unique judicial body, a specialized court with an expertise in juvenile matters. *E.g., Creek v. Stone*, 126 U.S. App. D.C. 329, 334, 379 F.2d 106, 111 (1967); *see* 11 D.C. Code § 1502 (b) (3). This expertise as well as a professional staff, 11 D.C. Code §§ 1523-24, is necessary in order to implement fully the *parens patriae* philosophy of the court and to comply with 16 D.C. Code § 2316, which provides in pertinent part:

⁵ "Tr." represents the proceedings at the District Court held on January 5, 1970.

⁶ The transcript of the plea proceedings of January 15, 1970, has not been prepared.

[The waiver statute] shall be liberally construed so that, with respect, to each child's coming under the court's jurisdiction:

(1) the child shall receive such care and guidance . . . as will serve his welfare and the best interests of the District . . .

Thus the Juvenile Court "is rightly vested with a broad range of discretion in light of its professional expertise." *Creek v. Stone, supra*, 126 U.S. App. D.C. at 334, 379 F.2d at 111.

The Juvenile Court may waive a child sixteen years of age or older after a *full investigation* is conducted. 11 D.C. Code § 1553. There should be and is considerable latitude in the Juvenile Court's determination of whether a child should be waived. The statute gives the Juvenile Court the degree of discretion necessary to determine factually whether the waiver is necessary. *Kent v. United States*, 383 U.S. 541, 552-553 (1966). The Juvenile Court in its awareness of the need for guidelines to assist it in exercising its discretion has promulgated criteria by which it will decide the issue of waiver.⁷ Consequently, the court should look to the potential rehabilitation of the child and the need to protect the public from his conduct. This is precisely what the court did in the instant case, and absent a showing of clear abuse of discretion that Juvenile Court's finding should be sustained.⁸ *Creek v.*

⁷ A "uniform policy position of the judges" of the Juvenile Court, issued May 18, 1966, over the signature of the chief judge, is reproduced as an appendix to our brief, *infra*, pp. 9-10.

⁸ This Court stated in *Kent v. United States*, 119 U.S. App. D.C. 378, 384, 343 F.2d 247, 258 (1964) [*Kent I*], *rev'd on other grounds*, 383 U.S. 541 (1966), when speaking of the use of a similar set of guidelines:

Applying the same criteria-freighted as they are with highly subjective elements-we perhaps might have reached a different result. But the essence of the juvenile court system is subjective judgment-the skill and experience of the specialist judge brought to bear upon young people in trouble. The revision of that trained judgment in a particular case by a non-specialist tribunal is a venture not to be undertaken lightly and without patent justification.

Stone, supra, 126 U.S. App. D.C. at 334, 379 F.2d at 111.

Appellant challenges the fullness of the court's investigation and in so doing attacks the wisdom of the judgment of the highly specialized juvenile judge in ordering waiver of jurisdiction. Appellant's attack must fail because the juvenile judge was obviously aware of the salient facts and made an informed choice between clear alternatives. The fact that appellant's counsel, or even this Court, might have chosen a different path to follow is immaterial, so long as the juvenile judge conducted a "full investigation."

The record amply demonstrates that there was a full investigation and refutes appellant's contention to the contrary. There was a complete hearing on April 22, 1969, which filled seventy-seven pages of transcript. At the hearing Miss Miller, appellant's probation officer, felt that appellant should be waived because he was an aggressive, untreatable child not amenable to the services of the court and had a history of absconding from his juvenile quarters. Miss Miller did appear inconsistent in her testimony at times as to whether appellant should be waived; however, none of her inconsistencies ever showed anything more than a compassion which she, as a social worker, felt might merit appellant's receiving one more chance in a never-ending series of unsuccessful, chance-riddled rehabilitative efforts (W.H. 3-29). The conclusive evidence of appellant's inability to be treated is brought to bear by the very nature of the charges which ultimately ripened into this appeal i.e., assault with a dangerous weapon on one of his own custodians in a juvenile facility. Such conduct strongly indicates that appellant is beyond the redemptive reach of the Juvenile Court and the facilities at its disposal.⁹ All the realistic rehabilitative possi-

⁹ We invite the court's attention to appellant's history as a juvenile, which is part of the record on appeal in a social worker's report dated January 8, 1969. On March 26, 1966, appellant was involved in a robbery with a knife; on April 14, 1966, he stole a car. Appellant was returned to the Cedar Knolls facility for one month and labeled by his teachers as "aggressive and hostile." He visited his home on January 15, 1967, but failed to return to the facility until February 23, 1967, when he was apprehended. He

bilities for appellant have been canvassed by the Juvenile Court. The record demonstrates that the court's investigative hearing was as full as the law requires and that the waiver was therefore proper. *Haziel v. United States*, 131 U.S. App. D.C. 298, 404 F.2d 1275 (1968).

As to the question of the danger posed by appellant to the public, one need only reread footnote 9, *supra*, to evaluate the authenticity of the court's finding on this score. We submit that no greater threat exist to the public than a "hostile, aggressive" young man with a history of escapes from the juvenile facilities, who in his most recent escape attempt resorted to the use of a weapon against his custodian.¹⁰

The Juvenile Court carefully conducted a hearing in which a full investigation revealed that the possibility of treating appellant as a juvenile had forever fled and that

absconded again on May 23, 1967, was caught and fled again on July 11, 1967. Appellant was released to his mother on June 21, 1968, and placed back in the Receiving Home two weeks later for stealing a car. He was released again and on September 5, 1968, was sent to the Children's Center for snatching a pocketbook. A shoplifting complaint was filed against appellant on December 6, 1968. Following the shoplifting incident the social worker, Neil L. Hoffman, filed his report of January 8, 1969, which labeled appellant as "criminal" and no longer delinquent in his actions.

¹⁰ Appellant argues that the court should have looked to the causes of the assault incident before relying on it to support its finding that appellant was a danger to the community. We find no lapse by the court in our reading of the record. We see a hostile young man who preyed on the public since he was eleven years old and who has been described by his social worker as "criminal." Consequently, regardless of the possible causes for the assault, the court was faced with the necessity of looking for ways to prevent such acts in the future and in so doing to assure the safety of an otherwise unprotected public.

Appellant further argues that since he was at the new facility for a few short weeks between September and November 1968, one can infer that the facility can properly cage appellant without further escapes. Such is hardly the case when one considers that appellant was housed in the maximum security section of the facility, was only there for six or seven weeks, and more than ten juveniles had escaped from the facility during the same period of time, described by Mr. Sherad as "recently" (W.H. 36-48).

the only proper immediate remedy was to care for the future and in so doing to treat appellant as an adult in the District Court, where security measures would satisfactorily protect the public from appellant's growing compulsion to escape and commit crimes of violence.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES F. FLYNN,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

APPENDIX**JUVENILE COURT OF THE DISTRICT OF COLUMBIA****May 18, 1966****UNIFORM POLICY POSITION OF THE JUDGES****No. 1: Waiver Standards and Factors Relevant Thereto.**

A judge in making his decision whether or not to waive will be guided by the following two standards, either one of which may serve as a sufficient basis for waiver:

1. *Treatability of the juvenile*, i.e., whether or not there are reasonable prospects for rehabilitating the juvenile by the use of facilities currently available to the Juvenile Court.
2. *Protection of the public*, i.e., whether or not there are reasonable prospects for adequately protecting the public by the use of facilities currently available to the Juvenile Court.

For the purpose of evaluating a particular case in terms of the Waiver Standards, the following factors are deemed relevant:

- a. Respondent's prior delinquent acts and the nature of his conduct therein.
- b. Nature of Respondent's alleged conduct in connection with the current charge, to the extent that
 - (1) such conduct forms a pattern of anti-social conduct that seems beyond the rehabilitative reach of facilities available to the Juvenile Court, or
 - (2) such conduct indicates that the juvenile is dangerous to the public (dangerous to be measured in light of circumstances surrounding the alleged conduct, such as aggressiveness, premeditation and the nature of the reasonably foreseeable consequences).
- c. Respondent's age, to the extent that a length of

time beyond the limits of Juvenile Court jurisdiction is required for reasonable prospects of rehabilitation.

d. Respondent's attitude, to the extent that it bears on his willingness to cooperate with Juvenile Court rehabilitative efforts.

e. Respondent's family environment (including the degree of care, supervision and support it provides the Respondent), to the extent that family support is essential to the Juvenile Court's rehabilitative program.

f. Respondent's prior contacts with rehabilitative facilities available to the Juvenile Court, in terms of the extent and apparent rehabilitative impact of such contacts.

g. Respondent's history of running away from juvenile institutions.

h. Respondent's history of aggressive or disruptive conduct while at juvenile institutions, to the extent that

(1) such conduct might result in Respondent's being isolated from the rehabilitative program of the juvenile institutions,

(2) such conduct might endanger the safety of other inmates at such juvenile institutions, or

(3) such conduct might impair the effectiveness of the rehabilitative programs for the other inmates at such juvenile institutions.

By the Court:

/s/ Morris Miller
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENT
TO
BRIEF FOR APPELLANT

(Insert after the quotation on page 28 of appellant's brief, and before
paragraph starting "B. . . .":)

In Haziel, at 1282, this Court remanded the case to the Juvenile Court of the District of Columbia "for a factual hearing to determine the actual quality of the appellant's participation in the decision to refuse a waiver hearing", and the order, as modified, required the Juvenile Court to complete the proceedings within a maximum of 30 days from the date the appellant was returned to custody, which occurred in October 1968. The records of this Court do not show that any response to its order was ever received from the Juvenile Court. Therefore, on the basis of the record, this Court has never resolved the waiver issue in Haziel, with the result that the appellant in that case has been deprived of due process of law. With Haziel left in that status, long after the time had expired for the Juvenile Court's compliance with the remand order, the Juvenile Court appears to have felt no compelling reasons to observe in its

2.

proceedings in this case all of the standards set forth in Haziel, which this Court appeared to hope "may well do more to improve future waiver proceedings that to correct the past." It is submitted that it is in the interest of future waiver proceedings, as well as in the interest of the appellant in this case, that this Court reaffirm its Haziel standards in this case and reopen the Haziel case to furnish that appellant the due process to which he still is entitled.

Respectfully submitted,

C. S. McClelland
4325 49th Street, N. W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement to Brief for Appellant was delivered to the Office of the United States Attorney, U. S. Courthouse, Washington, D. C. this _____ day of April, 1971.

C. S. McClelland

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 3 1970

Nathan J. Paulson
CLERK

C. S. McClelland
4325 49th Street, N.W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

CITATIONS

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Appellee's statement of the issue is in error for the reason that it is based upon its allegation, only, that the Juvenile Court conducted "a full investigation" whereas the adequacy of the investigation has never been established and the record is replete to show that such adequacy is, and since the waiver first was questioned, has been the basic issue in the case. Also, many cases of record, such as those

cited in appellant's brief (pp. 27-29), show that the District Court and this court possess, and have exercised, the right to reexamine the validity of the Juvenile Court's exercise of its jurisdiction to waive a child to the District Court. The cases are too numerous and too well known by appellee, as well as by this court, to warrant repetition here. Therefore, appellee confuses rather than states the issue in presenting it as one which involves the right of this court to reexamine the merits of the waiver. Appellee adds to that confusion in the digest of its argument (p.4) in which it in effect presents the issue as appellant's right to challenge the Juvenile Court's waiver, but proceeds to argue, for the most part, the "full investigation issue", whereas in its actual statement of the issue, it presents it as this court's right to reexamine the waiver. The digest, like the issue statement, is in error because it is premised upon the same allegation as to a "full investigation". The digest further, of course, also ignores the above mentioned cases of record, which leave no doubt that appellant does have the right to challenge the Juvenile Court's waiver.

While the appellee failed in the District Court so to contend, and still does not contend that the appellant was accorded due process of law--nor did it expressly contend in the court below that a full investigation was conducted (S. Rec. 38, pp. 15-24)--it now contends that the record amply

demonstrates that there was a full investigation and that all of "the realistic rehabilitative possibilities for appellant have been canvassed" by the Juvenile Court (Appellee's Br. 6, 7, (1)

8). In support of those contentions, the appellee relies solely on the fact that there was a hearing on April 22, 1969, "which filled seventy-seven pages of transcript." Appellee again illustrates the limitations of the basis of its contentions in a later statement in its brief that "The record demonstrates that the court's investigative hearing was as full as the law requires" (p. 8). But the criterion to determine the adequacy of the investigation required by law is, of course, not the fullness or the length of the hearing, on which the appellee relies, but the fullness of the investigation, which is not limited to the waiver hearing, and the content of the hearing, in demonstrating that all the possible dispositions short of waiver have been explored, Haziel v. United States, 131 U.S. App. D.C. 298, 404 F. 2d 1275, 1279 (1968). The appellee later contends that that criterion was met but fails to show any basis for the contention which, instead, only follows a reference to various charges against the appellant (pp. 6, 7). In that connection, this court has stated in Haziel, supra, at 1282, that:

The previous history of the youth is relevant. But its relevance lies not in the justification

(1)

Hereafter, unless otherwise indicated, page citations will refer to pages of appellee's brief.

it may provide for the Juvenile Court to abandon its statutory duty to help the young offender, but in the insight the past may contribute to the best strategy for rehabilitation.

Nevertheless, the appellee relies exclusively on appellant's history as the basis for its contention that appellant's conduct "strongly indicates that appellant is beyond the redemptive reach of the Juvenile Court and the facilities at its disposal (2) (p. 6). However, the conclusion suggested by that contention is not the conclusion of those who had witnessed--and therefore those in the position to know--the redemption progress of appellant prior to the issuance of the very good Progress Report of October 29, 1968, on the appellant and the recommendation that he continue in the same program in which appellant was doing so well and recommended to remain when the Juvenile Court inexplicably released him to the community (Appellant's Br. 17). Those facts would appear conclusively to negate the appellee's contention that the appellant was beyond the redemptive reach of the Court.

The negation of appellee's contention is underscored by the fact that the written recommendation and the testimony

(2)

Appellee appears uncertain of the significance of appellant's conduct. It first describes it as "conclusive evidence" and in the next sentence, that it "strongly indicates" that appellant is beyond redemption (p. 6).

furnished by the Court Intake Officer, Miss Miller, fail to support the appellee's conclusion that the appellant is beyond the redemptive reach of the Juvenile Court and the facilities at its disposal. On the contrary, she was explicit in her testimony in stating that since the court does have the facilities, "I feel that he should be exposed to . . . [them]" (O. Rec. 21, p. 27). A similar view was expressed by Mr. Sherad, supervisor of social work (O. Rec. 21, pp. 43, 44).

The appellee fails to mention Miss Miller's written recommendation against waiver and suggests that her testimony against waiver should be discounted as an expression of compassion only. Further, the appellee ignores appellant's progress in redemption at the New Facility prior to the court's release of him to the community. The foregoing appears to be the result of a conviction by appellee that it must ignore the fact that the Juvenile Court also failed to mention Miss Miller's written recommendation and failed to investigate and learn of the very good redemption progress accomplished by the appellant until the court itself terminated it, against the recommendation of its own arm, and released him, entirely unprepared, to the challenges and temptations of the community. However, in ignoring and repeating the failures of the Juvenile Court, appellee also ignores the obligation of the court to "make a thorough examination of the juvenile's possible future as well as his distressing past," (Underscoring supplied) Harrel, supra, at 1282, and

ignores the fact that a juvenile waiver hearing and investigation are not an adversary proceeding, or a pious charade, but an exploration in which "the Court itself cannot remain inert" but "must utilize its facilities, personnel and expertise for a proper determination of the waiver issue" Haziel, supra, at 1279, citing and quoting Black, 122 U.S. App. D.C. at 396, 343 F. 2d at 107. The required thorough examination must include an examination of alternative strategies for rehabilitation short of adult treatment, Haziel, supra, at 1279, 1280, and as stated in that case at 1280, the Juvenile Court did not indicate what facilities would be necessary to pursue alternative strategies. With respect to what facilities would be necessary, the waiver statement fails to show that any information was collected as to actions and plans by the New Facility to increase the height of the fence surrounding the Facility (Appellant's Br. 23). With respect to the required thorough examination, generally and utilization of its facilities, personnel and expertise, those requirements clearly appear unfulfilled in view of the Juvenile Court's failure to learn of appellant's good record at the New Facility and to rationalize the relation between the court's premature exposure of appellant to the community and the charges relied upon by the court in its conclusion to waive its jurisdiction. Appellee argues that regardless of the causes, that is regardless of the relationship between the premature exposure and those charges, "the court was faced with the necessity of looking for

ways to prevent such acts in the future and in so doing to secure the safety of an otherwise unprotected public" (p. 7, fn. 10). That rationalization of the cause-effect problem, of course, is vulnerable for several reasons. First, there is no question that the court was required to look "for ways" to rehabilitate the child and thereby prevent such acts in the future but the requirement embraces all "ways" short of adult treatment and the court's failure to indicate what facilities would be necessary to pursue alternative strategies and its failure to collect and disclose all relevant evidence demonstrating the existence of "ways" other than waiver to the District Court clearly establish that the court actually did not fulfill the requirement and that therefore it did not accomplish what appellee itself argues the court was required to do. Second, the concentration of the court, and the appellee, on the past, the previous history relating to charges against the appellant, in attempting to justify abandonment of the child to the District Court as the only "way" to rehabilitate him and protect the public makes the extent to which the court itself produced that past extremely important. No "way" relied upon by the Juvenile Court within its own facilities could offer any assurance of accomplishing the two objectives of the court, "to prevent such acts in the future" and to provide adequate protection of the public, when the court itself inexplicably abandons the "way" relied upon by abruptly

removing appellant from it and exposing him to the challenges and temptations of the community (the public) and exposing the public to him. Since the inexplicable act of the court, not the appellant's unfortunate lack of appropriate controls, prevented the "way" relied upon from accomplishing the two objectives involved and thereby was the proximate cause of the offenses charged against appellant, the court's reliance on those charges to support its conclusions in support of its waiver hardly deals with the appellant in the "reasonable and decent manner" referred to in Kent v. United States, 119 U.S. App. D.C. 378, 343 F. 2d 247, 256 (1964), rev'd on other gr'ds., 383 U.S. 541 (1966).

Third, if the effectiveness of the "ways" is to be determined upon the basis of the juvenile's demonstrated amenability or responsiveness, it obviously is necessary to establish that the juvenile actually was the cause of any determined lack of effectiveness of an adopted "way" and also the actual cause of the charges which followed. Therefore, contrary to appellee's contention otherwise, the court cannot be "looking for ways" without regard to the causes of their ineffectiveness and subsequent charges. If the juvenile is not, but the court itself is the cause, as in this case, then the Juvenile Court may not abandon its responsibility for the welfare of the child to the District Court on the ground that there is no available "way" short of that. The court's disregard of that fact is obvious and appellee's

statement that it could "find no lapse by the court" (p. 7, fn. 10) is unpersuasive, and the appellee clearly is in error in stating that the waiver "was ordered after complete and full investigation and involved a knowledgeable exercise of discretion and expertise" (p. 4). In view of the foregoing, the only serious consideration demanded by appellee's contention, in the face of much persuasive evidence to the contrary, that the waiver of the appellant was proper, is the extremity to which appellee pursues an adversary stance in a juvenile case and in one in which evidence of gross arbitrariness and unfairness to the appellant has not been disputed and in which evidence of a lack of the required full investigation may not be and has not been persuasively disputed. The stance taken by the appellee in this case impels appellant to invite attention to a portion of pages 32 and 33 of appellant's brief with respect to the arbitrary and unfair manner in which the Juvenile Court treated the appellant.

Appellee underscores its disregard of the obvious violations of due process, including the limitations of its own authority in prosecutions, especially in Juvenile cases, in pursuing an adversary stance so zealously as to suggest that appellant's residence at the New Facility provides no assurance of the effectiveness of that Facility to accomplish the objectives of the court with respect to appellant, because of the length of his residence, because he "was housed in the maximum security section", and because "more than ten juveniles

had escaped from the facility during the same period of time, described by Mr. Sherad as 'recently' (W.H. 36-48)" (p. 7, fn. 10). The pages of the waiver hearing referred to by the appellee do not support its reference to the number of escapees or the description attributed to Mr. Sherad. Appellant was in maximum security "due to over-population" (O. Rec. 21, p. 36). There is no evidence that his residence in maximum security was for disciplinary or security reasons. Indeed, the Progress Report of October 29, 1968, showing that appellant was doing very well at the New Facility in every respect, is strong evidence that there was no reason to place him in maximum security for disciplinary or security reasons.

In the final paragraph of page 3 of its brief, appellee refers to pages 2 to 15 of the waiver hearing transcript as the source of its statements in that paragraph. However, those pages of the transcript do not support appellee's statement that "Miss Miller admitted that appellant has a long history of absconding . . ." (Underscoring supplied). The cited pages show only an admission that Miss Miller was "aware of . . . the number of times that he has been in absconcence (O. Rec. 21, p. 7) and that to her knowledge appellant has a history of escapes from juvenile institutions", consisting of escapes or attempts to escape of "Approximately three or four times" (O. Rec. 21, p. 12). Also, the pages cited by appellee do not support its statement that "Miss Miller added that . . . one never knew whether he would be available for treatment or

whether he had escaped again".

In the second complete paragraph of page 3 of appellee's brief, it fails to mention that Miss Miller's acknowledgement that "if it was a fact that Orlando Willis stayed at the New Facility between the period September 1963 through the period November 1963", it would be her opinion that appellant "can and will stay at the New Facility" (O. Rec. 21, p. 16).

However, the adequacy issue, the process of resolving the "full investigation" issue in this case, is hardly determinable merely on the basis of the nature of the appellant's residence at the New Facility and the number of escapees at a certain time, as argued by appellee, for the reason, among others, that the resolution of the "full investigation" issue requires that the record show that the Juvenile Court determined "what facilities would be necessary," Baziel, supra, at 1230, at the New Facility so that appellant would not leave or, in other words, what would be necessary for adequate protection of the public. The court does not indicate in its waiver statement that it made any attempt to make that determination. In that connection, the waiver merely states that "The absconcence rate at the New Facility is high" It fails to show, as heretofore stated, that any information was sought with respect to actions and plans by the New Facility to increase the height of the fence. It makes no reference to the testimony of the social work supervisor at the waiver hearing

that the New Facility can contain the appellant for a long period of time; that it does have the physical structure to hold him; and that once the appellant becomes meaningfully involved in the program, his need to abscond and run away will lessen (O. Rec. 21, pp. 43, 44). Further, it fails to include any reference to the opinion expressed by the court Intake Officer that the appellant "can and will stay at the New Facility" since he remained there between the period September 1963 through the period November 1968 (O. Rec. 21, p. 7). Those deficiencies alone preclude fulfillment of the court's obligation to make a "full investigation" as to the adequacy of currently available facilities and those failing, what facilities would be necessary. Such deficiencies therefore preclude acceptance of appellee's contention to the contrary and of its contention that "the only proper immediate remedy was to . . . treat appellant as an adult in the District Court . . . ". In that connection, Appellee cites no part of the record to support ~~his~~ closing statement that the

investigation revealed that the possibility of treating appellant as a juvenile had forever fled and that the only proper immediate remedy was to care for the future and in so doing to treat appellant as an adult in the District Court, where security measures would satisfactorily protect the public from appellant's growing compulsion to escape and commit crimes of violence (pp. 7, 8).

The waiver order and supporting statement contain no similar language. Instead, they are in conflict with the appellee's statement to the extent that the waiver order supporting statement shows an acknowledgment of the possibility of treating

appellant, in the statement that "the rehabilitative services at the New Facility could benefit this Respondent", but that because of past history, the "absconcence rate" and "the history of absconcence and assaultive behavior", the court concluded, "Upon consideration of the entire record", that "by the use of facilities currently available there are not reasonable prospects for either rehabilitation of the Respondent or adequate protection of the public". However, those conclusions are not based upon what the investigation revealed, but (1) upon the waiver order supporting statement's misrepresentations of (3) what the investigation revealed and of "the entire record" (App't. Br. 25), and (2) upon the statement's omissions caused by the court's failure to conduct a full investigation and thereby learn of appellant's good record at the New Facility and the available action which could be taken, if necessary, to keep him there and thereby protect the public, and of the extent to which the court's own actions in prematurely withdrawing the appellant from the New Facility and exposing him, entirely unprepared, to the challenges and temptations of the community, caused appellant to be charged with the offenses relied upon in the court's waiver order.

(3)

That is, misrepresentations of the recommendation and testimony of Miss Miller and of the testimony of Mr. Sherad.

Appellee's use of the word, "possibility", in its closing statement, itself is inappropriate since it--as it and the Juvenile Court have from the beginning--disregards applicable law which requires that all possibilities first be explored before abandoning the child to the District Court.

As stated in appellant's brief, the procedure pursued by the Juvenile Court is the antithesis of that contemplated by both case and statutory law with respect to the appropriate protection and treatment of the juvenile, and entirely insupportable under ordinary concepts of due process of law (Appellant's Br., p. 33). Appellee's disregard of the Juvenile Court's violations of due process of law exceeds its own authority which is limited to seeing that justice is done to both parties so that "guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935). Therefore, instead of complying with its request that the judgment of the District Court be affirmed, this court would seem required to determine appropriate instructions to avoid such adversary procedure in the future.

A reading of the waiver hearing transcript leaves the distinct impression that the hearing and the investigation conducted by the court were, indeed, a charade, with the court appearing to remain quite inert for the most part and making practically no inquiries which demonstrated any desire to exhaust exploration of available treatment short of adult

treatment, and of the action the court considered necessary to make certain appellant would not leave the New Facility, so as to furnish adequate protection to the public. That impression is reinforced by the court's issuance of the waiver order long before the hearing transcript was available for consideration, coupled with the failure of that order and the supporting statement accurately to present the relevant evidence.

In abandoning its statutory duty to help the appellant, the court appears to have disregarded most of the rules. It based its conclusion as to the adequacy of protection of the public, upon appellant's previous history, the charges of abscondences and assaultive behavior by appellant, and did not indicate what facilities would be necessary to pursue alternative strategies so as to avoid such abandonment. The court compounded those deficiencies in its procedure by its concealment and misrepresentation of relevant conflicting evidence, including the testimony that the New Facility could contain appellant. The concealment and misrepresentation of relevant, conflicting evidence alone impels rejection of the court's conclusions, and since they show that the conclusions were, notwithstanding the court's statement to the contrary, not based "Upon consideration of the entire record", they conclusively preclude acceptance of the court's conclusions that there are not reasonable prospects for either rehabilitation of the appellant or adequate protection of the public.

CONCLUSION

For the reasons heretofore set forth in this and appellant's main brief, it is urged that the District Court's decision as to the validity of the waiver be reversed and that the conviction of the appellant be vacated and set aside.

Respectfully submitted,

C. S. McClelland
4325 49th Street, N.W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was delivered to the Office of the United States Attorney, U. S. Courthouse, Washington, D. C. this _____ day of December, 1970.

C. S. McClelland

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PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 13 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C. S. McClelland
4325 49th Street, N. W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24262

UNITED STATES OF AMERICA,

v.

ORLANDO RAY WILLIS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Appellant hereby respectfully requests a rehearing,
and suggests a rehearing en banc, on the issues on which a
panel of this Court on April 29, 1971, affirmed the judgment
of the United States District Court of the District of Columbia.

This extraordinary relief is required and warranted
for the reason that the affirmance in this case is in conflict
with the required standards set forth by at least two other
panels of this Court and for the reason that in view of the

colloquoy at the hearing before this Court on April 20, 1971, the affirmance appears to be based in part at least upon a premise that the evidence before the District Court justifies in effect a disregard of whatever lack of evidence existed in the Juvenile Court proceedings whereas, as will be shown, the lack of one item of evidence alone in the District Court proceedings precluded any finding that the waiver of the appellant was valid.

The affirmance in this case, in effect at least, gives complete latitude to the Juvenile Court's discretion as referred to in the case of Creek v. Stone, 126 U. S. App. D. C. 329, 334, 379 F. 2d 106, 111 (1967), whereas the panel in that case, as well as the panel in the case of Kent v. United States, 119 U. S. App. D. C. 378, 387, 343 F. 2d 247, 256 (1964), rev. on other grds., 383 U.S. 541 (1966), makes it clear that the latitude is not complete because, like the exercise of any other discretion, it is subject to applicable law and constitutional provisions which, the panel identified, in Kent as "the basic requirements of due process and fair treatment" and "the statutory requirement of a 'full investigation'". The Kent panel makes it clear at 256 that the Court contravenes the statutory requirement if it does not collect "sufficient evidence to make an informed, intelligent decision". Such evidence, stated the panel in the case of Haziel v. United States, 131 U. S. App. D. C. 298, 404 F. 2d 1275, 1279 - 1280 (1968), citing and in part quoting the statute itself, 16 D. C. Code 2316(1) (1967), must

show that "all the possible dispositions short of waiver" have been explored by the Court and that the Court has determined "what facilities would be necessary" to justify continuation of treatment as a juvenile. The appellee itself was unable to inform this Court of any evidence -- and there is no evidence -- that such a determination was made in this case either by the Juvenile Court or the District Court. Even if the failure of those Courts in this case to observe other Haziel standards be ignored, Haziel at 1278, 1279, leaves no doubt that failure to determine all possibilities short of waiver, including "what facilities would be necessary", alone, constitutes failure to conduct the required "full investigation" and therefore precludes withdrawal of treatment as a juvenile.

The failures of the Juvenile Court were repeated by the District Court.

Haziel, then, it is submitted, is a bar to acceptance of either the conclusions of the Juvenile Court or the finding of the District Court that appellant is not properly treatable in a juvenile facility and that the public could not be adequately protected if the juvenile remained within the jurisdiction of the Juvenile Court.

As stated in the supplement to appellant's brief, since the records of this Court show that the Juvenile Court has never responded to the remand order in Haziel, the Juvenile Court (as well as the District Court) appears to have felt no compelling reasons to observe in its proceedings in this case all of the standards set forth in Haziel, which this Court appeared to hope "may well do more to improve future waiver proceedings than to correct the past". As

a friend of the Court as well as counsel for appellant in this case, counsel feels obligated to request that the Haziel case be reactivated, and appropriate counsel appointed, to give that appellant his full day in Court.

If, for any reason, notwithstanding the prejudice to the appellant in Haziel as well as in this case, including the prejudice to their future, especially in matters of employment, enforcement of Haziel standards now must be subordinated to other considerations, it is strongly suggested that the appellants (as well as the Courts involved) need an expression of the rationale of this Court to help them to try to understand that the processes in the Courts, to which they have been exposed, have been as appropriate and fair as they could expect under the concepts and requirements of justice applicable to their cases. It is submitted that in the light of the public interest criterion of the Juvenile Court, an informed appellant, irrespective of whether he is in agreement with the information, is better assurance for the protection of the public than a confused, and uninformed and perhaps by reason of his confusion and lack of information, a hostile one.

The social work supervisor testified at the waiver hearing that the New Facility can contain the appellant for a long period of time, and that:

... we do have the facilities, the physical structure to hold him and we think once he becomes meaningfully involved in the program, of course, his need to abscond and run away will lessen.

(O. Rec. 21, p. 44).

The intake worker at the waiver hearing answered in the affirmative to the question:

... if it was a fact that Orlando Willis stayed at the New Facility between the period September 1968 through the period November 1968, it would be your opinion that, in fact, this boy can and will stay at the New Facility?

(O. Rec. 21, p. 16).

The record shows that the appellant was at the New Facility from September 10 to November 1, 1968 (O. Rec. 21, pp. 36, 50). The Progress Report on that period (O. Rec. 37) shows that the appellant had become meaningfully involved in the program. The report shows that he was making a very good adjustment; that the staff felt positive toward him; that he was doing a very good job; that he was a leader in the shop; that no disciplinary problem had been encountered with him; and that the New Facility recommended that he be kept in the same program. It is submitted that the foregoing shows that the program at the New Facility constituted the "plan" referred to in Haziel, at 1279, whereby the welfare of the child and the safety of the community could have been served without waiver. But the Juvenile Court did not perform its duty, as referred to in Haziel, to utilize its facilities and personnel to determine what accounted for the gap in the chronological data in its waiver order supporting statement (Part of Juv. Ct. File No. 69-0369-J), and thereby learn what good progress appellant had made at the New Facility. Since the Juvenile Court did not perform its duty to collect the evidence of record showing available existent

facilities or its duty to determine the facilities necessary, to serve the welfare of the child and the safety of the community, if there had been no available existent ~~available~~ facilities, the Juvenile Court's failure to conduct the required "full investigation" is, on the basis of Haziel standards compounded, as is the appellant's confusion with the panel's affirmance of the judgment of the District Court that the appellant is not properly treatable in a juvenile facility and that the public could not be adequately protected if the appellant remained within the jurisdiction of the Juvenile Court. Under the circumstances, such judgment appears to contravene this Court's position in Haziel that the parens patriae principle which justifies some tampering of the adversarial nature of the process reinforces the duty of the judge to insure that the child receives the full benefits promised by the statutory scheme.

The present state of the official record leaves the appellant in a complete state of confusion (1) as to precisely what more the courts, as creatures of the community, have concluded he should have done, in addition to what he was doing at the New Facility to establish that installation as a means of rehabilitation and public protection and thereby entitle him to remain and return there, and (2) just how much misrepresentation (however unintentional) of the record and of his image he must be expected to endure and still remain unadversely affected in his manifestations toward the community.

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For the reasons heretofore set forth, it is urged that
this petition be granted.

Respectfully submitted,

C. S. McClelland
4325 49th Street, N. W.
Washington, D. C. 20016

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition
was delivered to the Office of the United States Attorney, U. S.
Courthouse, Washington, D. C. this _____ day of May, 1971.

C. S. McClelland